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No. 06-1345

IN THE

Supreme Court of the United States

MIPRO HOMES, L.L.C., AND BUILDERS LEAGUE OF SOUTH NEW JERSEY, INC.,

Petitioners,

v.

MOUNT LAUREL TOWNSHIP,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to S. Ct. R. 37.2(b), the American Farm Bureau Federation ("AFBF") hereby moves to file the attached brief amicus curiae in support of petitioners in the above-captioned matter. Petitioners MiPro Homes, L.L.C. and Builders League of South New Jersey, Inc. have consented to the filing of AFBF's brief; a copy of their consent letter has been filed with the Clerk. Respondent Mount Laurel Township has refused to consent to the filing of AFBF's brief, thus requiring AFBF to file this motion.

AFBF is a voluntary general farm organization formed in 1919 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico, representing more than 6.2 million member families.

AFBF and its members have a direct and substantial interest in this case. Since this Court's decision in *Kelo* v. *City of New London*, 545 U.S. 469 (2005), the number of so-called "economic development" takings has been on the rise. America's farmers—who own vast tracts of open land—are attractive targets for municipalities and other government entities seeking such land for "economic development" and other similar purposes. As a consequence, unfortunately, America's farmers are thus also at particular risk of becoming victims of eminent domain abuse.

In *Kelo*, this Court made clear that the Takings Clause embodies at least minimum procedural protections that ensure that eminent domain decisions are "considered" and worthy of judicial deference. *Id.* at 483. In upholding a taking that was blatantly *ad hoc* and pretextual, the Supreme Court of New Jersey below cavalierly swept away virtually the only protection that farmers have left against unwarranted or ill-advised takings: the protection offered by a comprehensive planning process in which the government's *actual* reason for a taking is subjected to public scrutiny and debate. If left to stand, the decision below will embolden government entities to seize private property without engaging in any sort of meaningful deliberative process, thereby subjecting farmers to even greater risk of eminent domain abuse.

Accordingly, AFBF respectfully requests that its motion for leave to file a brief amicus curiae in support of petitioners be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919 under the General Not-For-Profit Corporation Act of the State of Illinois.[1] AFBF was founded to protect, promote,

[1] Pursuant to this Court's Rule 37.6, AFBF notes that no part of this brief was authored by counsel for any party, and no person or entity other than AFBF or its members made a monetary contribution to the preparation or submission of the brief.

and represent the business, economic, social, and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico, representing more than 6.2 million member families.

As explained further below, America's farmers are attractive targets for government officials seeking land for "economic development" and other similar purposes, and are thus also particularly vulnerable to eminent domain abuses. Accordingly, AFBF and its members are directly affected by the decision of the Supreme Court of New Jersey below, which gives *carte blanche* to government officials to take land on a pretextual basis and without subjecting the eminent domain decision to a comprehensive planning process.

AFBF, often together with one or more of its member state Farm Bureaus, has filed briefs amicus curiae before this Court in numerous takings cases over the past two decades, including *Kelo* v. *City of New London*, 545 U.S. 469 (2005); *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Because of AFBF's acute and ongoing concern with eminent domain abuse, and because AFBF and its members closely monitor eminent domain litigation and legislation throughout the country, AFBF is uniquely situated to bring to the Court's attention the troubling implications of the decision below.

SUMMARY OF ARGUMENT

Since this Court's decision in *Kelo*, the number of so-called "economic development" takings has risen dramatically. America's farmers—who own vast tracts of open land—have become attractive targets for government entities seeking land for "economic development" and other similar purposes, and are thus at increased risk of becoming victims of eminent domain abuse. In *Kelo*, this Court held that "empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." 545 U.S. at 488 (quotation omitted). But *Kelo*'s directive that courts steer clear of public policy debates does not mean that courts have no role to play in enforcing constitutional checks on the government's exercise of the Takings Clause. To the contrary, *Kelo* itself makes clear that the Constitution places procedural limitations on the government's exercise of eminent domain that ensure that the government's decision to take private property is truly "considered" and made pursuant to a comprehensive planning process. *Id.* at 478.

The Supreme Court of New Jersey ignored this aspect of *Kelo* in upholding a taking that was, for reasons thoroughly recounted by petitioners, both *ad hoc* and pretextual. *See* Pet. 2-7, 21-23. That makes its decision troubling in two important respects. Not only does it flout *Kelo*, but it strips farmers of virtually the only protection they have left against unwarranted or ill-advised takings: the protection provided by public scrutiny and open debate. If courts are to defer to political determinations of what is an appropriate "public use," it is critical that they at least ensure that such political determinations are the result of a planning process that satisfies, at a minimum, basic standards of procedural fairness.

ARGUMENT

I. AMERICA'S FARMERS ARE PARTICULARLY VULNERABLE TO EMINENT DOMAIN ABUSES.

For American farmers, "land ownership and private property rights associated with land ownership [are] sacred. * * * [F]armland is their principal asset[,] their ability to capitalize their business by using the land as collateral for loans, their life savings, and their pension * * *." *See* Testimony of Bob Nolan, President-Elect, Long Island Farm Bureau, before the New York Senate Committee on Commerce, Economic Development and Small Business (Oct. 19, 2005).[2] Farmers are particularly loathe to give up their land to eminent domain, because in their estimation the value of their land far exceeds its "fair market value." *See Coniston Corp.* v. *Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (Posner, J.) (noting that "because of relocation costs, sentimental attachments, or the special suitability of the property for their particular * * * needs," certain categories of owners "value their property at more than its market value").[3] It is an unfortunate irony, then, that farmers—the class of landowners with perhaps the deepest connection to the land they own—are also at particular risk of having that land swept out from under them by aggressive and abusive eminent domain practices.

1. In recent years, the number of takings of private property for economic development has skyrocketed. Between

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[2] *Available at* http://209.85.165.104/search?q=cache:9cJgMVYg-PoJ:www.lifb.com/fileadmin/Policy_Information/emiment_domaine_test_05.doc+kelo+farms&hl=en&ct=clnk&cd=1&gl=us.

[3] That assumes that farmers will be offered fair market value for their land in the first place, which often is not the case. *See generally* Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871 (2007) (collecting cases and studies suggesting that localities usually offer potential condemnees far less than the fair market value of their property).

1998 and 2002 alone, more than 10,000 condemnations for economic development purposes were either threatened or filed. *See* Dana Berliner, Institute for Justice, *Public Power, Private Gain* 2 (2003).[4] That translates into a rate of more than 2,000 actual or threatened "economic development" takings per year. Post-*Kelo*, those numbers have jumped exponentially: In the one-year period beginning in June 2005, more than 5,700 actual or threatened economic development takings occurred. *See* Dana Berliner, Institute for Justice, *Opening the Floodgates: Eminent Domain Abuse in the Post-*Kelo *World* 1 (2006).[5]

America's farmers are among the chief victims of this eminent domain juggernaut. Reports documenting the use of eminent domain note that farmers have been targeted for years and that, post-*Kelo*, "agricultural land has been taken for still more retail development." *See id.* at 3. *See also* Government Accounting Office, *Eminent Domain: Information About Its Uses and Effect on Property Owners and Communities Is Limited*, GAO-07-28, at 34 (Nov. 2006) (noting that, according to farming organizations, "farmland may be wrongly designated as blighted" and condemned on that basis even when its buildings are "fully functional or operable").[6] Legislators similarly have recognized that farmers are at particular risk of having their land seized. *See, e.g.*, Statement of Rep. John McHugh (Nov. 3, 2005) (noting that *Kelo* and the practices it approved have "made many property owners vulnerable, particularly our upstate farmers").[7] And because they are such attractive targets for the exercise of eminent domain, farmers are particularly vulnerable to eminent domain abuses.

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[4] *Available at* http://www.castlecoalition.org/pdf/report/ED_report.pdf.

[5] *Available at* http://www.castlecoalition.org/pdf/publications/floodgates/intro.html.

[6] *Available at* http://www.gao.gov/new.items/d0728.pdf.

[7] *Available at* http://mchugh.house.gov/pr2005/110305_eminentdomain.html.

There are several reasons why government officials are targeting farmers' land. To begin with, farms tend to generate less tax revenue per acre than would be generated by a shopping mall, office complex, or residential subdivision on the same property. *See* Testimony of Bob Nolan, *supra.* Farmland also typically is flat and open—as opposed to forested or blighted—which makes it especially attractive to developers looking to minimize their land-preparation costs. *Id.* And because farmers tend to own large parcels of land, targeting a farm allows local governments to seize the land they need while minimizing bureaucratic hassles and headaches; if a municipality needs 30 acres of land to build a shopping center, it is much easier to wage a political and legal battle against one farming family rather than dozens or hundreds of residents of a subdivision.

2. Some states have begun to take steps to protect farmers by declaring their land off-limits to eminent domain except in certain circumstances. *See, e.g.*, Patricia E. Salkin, *Eminent Domain Legislation Post-*Kelo*: A State of the States*, 36 Envtl. L. Rep. 10864, 10869 (Nov. 2006) (noting that states including Idaho, Tennessee, Nebraska, and Missouri have revised their laws to ensure, among other things, that agricultural land cannot be deemed "blighted" and condemned on that basis). But despite these steps in the right direction, farmers continue to lose their land to questionable eminent domain practices.

In Troy, Illinois, for example, the city council recently condemned 175 acres of farmland for a shopping center anchored by a Lowe's Home Improvement store and other national chains. *See Opening the Floodgates* at 40 (citing Jennifer Kapiolani Saxton, *Troy May Force Sale Of Land For Retail Development*, Belleville News-Democrat (Oct. 5, 2005)). In Coatesville, Pennsylvania, the city notified farmer Dick Saha in 1999 that it intended to condemn his 48-acre farm to build a municipal golf course as part of a proposed $60 million recreation center featuring go-karts and batting cages. *See* Monica Yant Kinney, *Fighting to Keep Their*

Farm Intact, Philadelphia Inquirer (June 4, 2002).[8] The city's initial condemnation approval touched off a six-year battle that featured three amendments to the city charter aimed at preventing the taking. *See* http://www.saveourfarm.com. In May 2005, the Sahas and the city finally reached a settlement permitting the Sahas to keep most of their farm. But it was a Pyrrhic victory: The Sahas incurred over $300,000 in legal bills, thus exhausting most of their retirement savings in defending their property. *Id.*

The Davidson family of Armona, California was less fortunate. The Davidsons learned last year that the local Community Services District planned to take their 20-acre farm—which had been their home for four generations—and cover it with evaporation ponds. Local officials voted to reconsider after "an uproar from the Davidson family and sympathetic comments from much of the audience." *See* Seth Nidever, *Severing Family Roots: Family Plans To Battle Armona Community Services District To Keep 4-Generation Land*, Hanford Sentinel (Dec. 18, 2006). But the Davidsons eventually lost their fight; on March 21, 2007, the Community Services District voted to take the Davidsons' property. *See* http://armonafarm.com/index.html.

In Piscataway, New Jersey, the Halper family lost its 75-acre farm after battling the city for six years. *See, e.g.*, Diane Walsh, *Appeals Court Awards Halper Acreage to Piscataway*, The Star-Ledger (Mar. 23, 2004). During the long fight, the township cited a string of unrelated uses for the property, including open space, a park, and private development. *Id. See also Piscataway Proceeds With Condemnation Of Farm*, SierraActivist.org (Apr. 2, 2004). To add insult to injury, the township accused the Halpers of refusing to cooperate with town officials in helping them find a new home. But as the Halpers explained, "relocation specialists" had attempted to "assist" them by sending them a list of small homes and apartments to which they could move. *See* Matt Labash, *This Land Is Whose Land?*, The Weekly

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[8] *Available at* www.freerepublic.com/focus/news/694382/posts.

Standard (Sept. 11, 2006.) As family patriarch Larry Halper put it: "I don't have an apartment. I have a farm." *Id.*

II. THE DECISION BELOW STRIPS FARMERS OF VIRTUALLY THE ONLY PROTECTION THEY HAVE LEFT AGAINST EMINENT DOMAIN ABUSES.

In *Kelo*, this Court held that the government has "broad latitude in determining what public needs justify the use of the takings power." 545 U.S. at 483. At the same time, however, the Court made clear that the Takings Clause embodies at least minimum procedural protections to ensure that eminent domain decisions are indeed "considered" and thus worthy of such deference. *Id.* Those important procedural safeguards are virtually all that farmers have left to protect themselves from unwarranted takings. In upholding a taking that was blatantly *ad hoc* and pretextual, *see* Pet. 2-7, 21-23, the decision below not only flouts this Court's decision in *Kelo*, but puts farmers at increased risk of eminent domain abuse. This Court should grant review to reaffirm that *Kelo* did not give government entities *carte blanche* to seize private property without subjecting the "true" reason for a taking to comprehensive public review.

1. As petitioners note, *see* Pet. 13, the Court's decision in *Kelo* is replete with references to the comprehensive nature of New London's development plan and the deliberations that had gone into that plan's genesis. Indeed, *Kelo* begins with a detailed recounting of the intricate steps local planners took to bring their plan to fruition: the New London Development Company ("NLDC") was reactivated; the state issued a bond to support the NLDC's planning activities; the NLDC sought and received "initial approval from the city council" and "held a series of neighborhood meetings to educate the public about the process"; the NLDC received yet another city council authorization; and, finally, the NLDC obtained state-level approval. 545 U.S. at 473. That state-level approval was itself a full-blown process, involving "[v]arious state agencies" that "studied the project's economic, environmental, and social ramifications," as well as

"a team of consultants" that "evaluated six alternative development proposals." *Id.* at 473 n.2.

The *Kelo* Court went on to intimate that it was precisely because of this comprehensive, deliberative planning that the city's public use determination was "entitled to * * * deference." *Id.* at 483. In holding that deference was appropriate, the majority observed that New London had "carefully formulated an economic development plan," that it was "endeavoring to coordinate a variety of commercial, residential, and recreational uses of land," that the plan was "comprehensive," and that "thorough deliberation * * * preceded its adoption." *Id.* at 483-484. Justice Kennedy, who provided the deciding vote, picked up this thread in his concurrence. He wrote that while there may be cases in which a departure from rational basis review is warranted, *Kelo* was not such a case because the New London taking "occurred in the context of a comprehensive development plan," and the city "complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Id.* at 493 (Kennedy, J., concurring).

2. In short, it is impossible to ignore the fact that "the word 'plan,' 'planning,' or 'planner' appears over 40 times in the majority opinion" in *Kelo*. John D. Echeverria, Lingle, *Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 Envtl. L. Rep. 10,577, 10,586 (Sept. 2005). Thus, far from abandoning the field in all but those rare cases where the proverbial "stupid staffer" admits malfeasance, *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) (quotation and alteration omitted), *Kelo* underscores an "important * * * limitation" on the eminent domain power—"that the courts should uphold, or at least pay deference to, government exercises of eminent domain only when the authority is used to implement a comprehensive plan for an entire area developed with intensive public involvement and approved by responsible elected officials." Echeverria, 35 Envtl. L. Rep. at 10,586.

Kelo, in other words, emphasizes that courts are well-suited to check the takings power, while still avoiding policy imbroglios, by simply ensuring that the locality has run its

plan through the wringer of the democratic process. *See* Clayton Gillette, *Kelo and the Local Political Process*, 34 Hofstra L. Rev. 13, 18 (2005) (arguing that *Kelo* contemplates "a process that involves significant engagement by multiple actors in public hearings concerning what should be constructed where and by whom"). Where such a process is absent—where the eminent domain decision is *ad hoc* or pretextual—the courts should presume that the taking fails to satisfy the public use requirement. *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (noting that "there may be categories of cases in which * * * the procedures employed [are] so prone to abuse * * * that courts should presume an impermissible private purpose").

Indeed, the highest court of at least one state has read *Kelo* in just this way. In *Mayor & City Council of Baltimore City* v. *Valsamaki*, 916 A.2d 324 (Md. 2007), the Maryland Court of Appeals rejected the argument that the City of Baltimore could take private property based on a simple recitation that the land would be used for "business expansion." *Id.* at 348-351.[9] The court noted that the city had no detailed plan for what precisely would happen to the condemned land, and deemed *Kelo* incompatible with a finding that "public use" had been established in such circumstances. *Id.* at 352 (noting that the taking in *Kelo* was "conducted pursuant to [a] comprehensive development plan[] * * * in place prior to the taking").[10]

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[9] The *Valsamaki* court was dealing with a "quick-take" procedure, and its precise holding was that the city had not justified use of that procedure. But the court also emphasized that the city likely would have failed to demonstrate public use "even had the case involved the use of regular condemnation," *id.* at 351, and that, separate and apart from the quick-take issue, the city's action did not "fully comport" with the approach approved by *Kelo*. *Id.* at 352.

[10] At least one federal court has employed the same approach to *Kelo*. *See MHC Fin. Ltd. P'ship* v. *City of San Rafael*, 2006 WL 3507937, at *14 (N.D. Cal. 2006) (denying city's motion for summary judgment on the grounds that, "[i]n *Kelo*, the City of New London offered a 'carefully considered development plan,'

3. This reading of *Kelo* makes good sense. If courts must eschew "empirical debates over the wisdom of takings," *Kelo*, 545 U.S. at 488, it follows that those debates are being entrusted to the political process. The only protection for landowners, then, is to ensure that the political process is actually being employed. Requiring that the eminent domain decision be reached through a comprehensive planning process—in which the government's *actual* reason for a taking is vetted—provides this assurance because "[o]ne would anticipate that any such process will attract competing views—not only between property owners and developers, but also among developers, contractors, and planners." Gillette, *supra*, at 18. "As a result, the capacity of a small rent-seeking group to impose its will on a complacent majority or an under-represented minority is diminished." *Id.*

Indeed, such an approach offers several checks on the government's otherwise untethered eminent domain power. First, it ensures that those whose land is to be taken will have their say at a time when that say might still matter. Second, it ensures that the community has openly and honestly weighed the impact of the taking on the landowner and deemed it necessary for the greater good. Third, it provides some assurance that—unlike in the instant case—the right hand of government is not taking steps of which the left hand is blissfully unaware. *See* Pet. 4-5 ("In deciding to acquire MiPro's property, Mount Laurel officials did not consult with the Planning Board"). This sort of procedural deliberation is critical if America's farmers are to have any recourse other than capitulation in the face of an arguably unreasonable or unnecessary assertion of eminent domain. As the examples in Part I, *supra*, illustrate, it is easy for the government to make an *ad hoc* decision, behind closed doors, to take Farmer Smith's land. That does not mean it would reach the same

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* * * [w]hereas here, the City proffers no such evidence, thereby inviting the court's inference that the ordinance simply confers a private benefit on the incumbent tenants.") (quoting *Kelo*, 545 U.S. at 478).

decision if forced to justify that decision under the bright lights of an open forum.

4. In upholding what can only be described as a "random taking," Pet. App. 3a, the Supreme Court of New Jersey cavalierly swept aside the basic procedural safeguards that this Court has recognized are inherent in the Takings Clause. If left to stand, the decision will embolden government entities to seize private property for "economic development" and other similarly vague purposes without subjecting their decisions to public scrutiny and debate. AFBF recognizes that the taking of private property—including farmland—is sometimes necessary and unavoidable. But if farmers are going to have any meaningful opportunity to convince government officials that the taking of their land is unreasonable or unwarranted, this Court must reaffirm that the Takings Clause requires eminent domain decisions to comport with basic standards of procedural fairness.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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